DATUK T.P. MURUGASU

v.

WONG HUNG NUNG

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 212 OF 1987]
19 JANUARY 1988

CIVIL PROCEDURE: *Respondent is a football player registered with Selangor Football Association - Selected to represent Malaysia in Asian Games - Respondent summoned to appear before Executive Committee of Association - Enquire into allegation of gross misconduct - Found guilty of the charge and suspended for life from playing - Whether Executive Committee proper body to deal with charge - Constitution provides matter to be dealt with by Disciplinary Committee - Whether respondent waived his right to have matter heard by Disciplinary Committee by appearing before Executive Committee - Question of waiver not pleaded or raised in affidavit-in-reply to respondent's affidavit - Issue of waiver raised only in course of argument - Whether plea of waiver can be raised without amendment of affidavit-in-reply or filing supplementary affidavit raising such plea.*

The respondent is a football player registered with the Selangor Football Association which is a member of the Football Association of Malaysia ("the Association") and was at all material times a member of the national football team selected to represent the country in the Asian Games held in South Korea in September 1986. He was alleged to have committed gross misconduct and bringing the game into disrepute, in that, he had instigated some members of the national team to deliberately lose the game against Saudi Arabia at Kwangju Stadium in South Korea on 21 September 1986 and also offered the sum of RM5,000 to each of them for Malaysia to lose by a two-goal margin. Consequently, the respondent was summoned to appear before the Executive Committee of the Association which held an enquiry into the allegation and duly found the charge proved and the respondent guilty. The Executive Committee imposed on him the penalty of suspension for life from playing, coaching or holding any office in any association or club participating in any tournament or competition organised by the Association.

As a result the respondent instituted proceedings for a declaration that the decision of the Executive Committee of the Association made on 20 October 1986 was null and void and an injunction to restrain the Association from enforcing it. Harun J granted the declaration and the injunction sought on 4 May 1987. Hence this appeal by the appellants. The only issue for determination is the question of waiver and acquiescence raised on behalf of the appellants by virtue of the respondent's appearance before the Executive Committee.

Held:

[1] Waiver should be found only on clear evidence, particularly when a person in the position of the respondent in this case was without legal assistance in the domestic forum as legal representation at an enquiry was specifically excluded by the Association's Constitution and none was accordingly suggested or accorded notwithstanding the extremely grave charge preferred against the respondent. The circumstances of this matter disclosed in evidence clearly refute any semblance of waiver or acquiescence by the respondent. A waiver must be an intentional act with knowledge.

[2] It is abundantly clear that the respondent had neither intention nor knowledge to meet the requisite criteria and as agreed by the appellant's Counsel the respondent did not know before which body he was appearing, and it was apparent from the circumstances that he was not fully cognisant of his rights and was only conscious of having to appear before the Association at an enquiry in relation to an allegation of serious misconduct on his part.

[3] The issue of waiver was only taken in the course of argument in the High Court; it was never properly pleaded or raised in the affidavit-in-reply to the respondent's affidavit in support of his summons. Therefore it was clearly impermissible to raise a plea of waiver without an amendment of the affidavit-in-reply or a supplementary affidavit raising such plea.

[4] In any event, as under the Association's Constitution only the Disciplinary Committee is empowered to exercise the jurisdiction of the Council of the Association in all cases of misconduct and infringement of the Constitution, there can be no waiver, if waiver can apply at all, to confer jurisdiction in the matter on the Executive Committee. Jurisdiction does not originate in the consent or acquiescence of the parties and cannot be established, where it is absent, by such consent, acquiescence or waiver of rights.

[Appeal dismissed with costs. Deposit lodged in Court by way of security directed to be paid out to respondent.]

Cases referred to:

Pemungut Hasil Tanah, Kota Tinggi v. United Malayan Banking Corporation Berhad [1982] CLJ (Rep) 244; [1984] 1 CLJ (Rep) 51; [1984] 2 CLJ 146; [1984] 2 MLJ 87; [1984] 3 WLR 867

Motilal Pedampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh [1979] AIR SC 621

Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour and Manpower & Anor. [1983] CLJ (Rep) 266

Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers [1983] CLJ (Rep) 150

For the appellants - Raja Aziz Addruse (Fadzil Omar with him); M/s. Hazzan & Fadzil

For the respondent - Bhag Singh (L.H. Chua and S. Selvarajah with him); M/s. Bhag. Sulaiman & Co.

JUDGMENT

Eusoffe Abdoolcader SCJ:

The respondent is a football player registered with the Selangor Football Association which is a member of the Football Association of Malaysia ('the Association') and was at all material times a member of the national football team selected to represent the country in the Asian Games held in South Korea in September 1986. He was summoned, on a charge of having committed gross misconduct and bringing the game into disrepute in that he had instigated some members of the national team to deliberately lose the game against Saudi Arabia at Kwangju Stadium in South Korea on 21 September 1986 and also offered the sum of RM5,000 to each of them for Malaysia to lose by a two-goal margin, to appear before the Executive Committee of the Association which held an enquiry into the allegation and duly found the charge proved and the respondent guilty, and imposed on him the penalty of suspension for life from playing, coaching or holding any office in any association or club participating in any tournament or competition organised by the Association.

The respondent as a result instituted proceedings by way of originating summons on a number of grounds for a declaration that the decision of the Executive Committee of the

Association made on 20 October 1986 was null and void and an injunction to restrain the Association from enforcing it, and Harun Hashim J granted the declaration and injunction sought on 4 May 1987. In this appeal against that decision we are only concerned with one issue, *scilicet*, that of waiver or acquiescence on the part of the respondent by virtue of his appearance before the Executive Committee.

Raja Aziz Addruse for the Association made a valiant effort in the first instance to argue that although under the Constitution of the Association the matter should have been dealt with by the Disciplinary Committee, it was still open in the circumstances to the Executive Committee to hold the enquiry and deal with it as it did but after some gentle probing by us into the matrix of his submission by reference to the requisite provisions of the Association's constating instrument he gracefully resiled and conceded that the Executive Committee had in fact no jurisdiction or power to do so, but then promptly proceeded to rely on his alternative submission that by appearing before the Executive Committee the respondent had waived his right to have the matter heard by the Disciplinary Committee on the premise that his relationship with the Association is contractual and can therefore be waived by him. We would immediately point out the fallacy of the premise in that the respondent has no direct contractual relationship or privity with the Association as he cannot be and is not a member of the Association as defined in its Constitution; the Selangor Football Association with which the respondent is registered as a player is.

The only issue for determination is therefore the question of waiver and acquiescence raised on behalf of the Association. Raja Aziz agrees in answer to a question we put that apart from the letter of 3 October 1986 from the Executive Secretary of the Association summoning him to attend before the Executive Committee, the respondent did not know before which body of the Association he was appearing. It must be borne in mind that the respondent did not have the benefit of legal advice or representation; legal representation at an enquiry is specifically excluded by the Association's Constitution and none was accordingly suggested or accorded notwithstanding the extremely grave charge preferred against the respondent.

Waiver should be found only on clear evidence, particularly when a person in the position of the respondent in this case was without legal assistance in the domestic forum. The circumstances of this matter disclosed in evidence clearly refute any semblance of waiver or acquiescence by the respondent. A waiver must be an intentional act with knowledge [*Pemungut Hasil Tanah, Kota Tinggi v. United Malayan Banking Corporation Berhad* [1982] CLJ (Rep) 244, a decision of the Federal Court affirmed by the Privy Council: [1984] 2 MLJ 87; 1 CLJ (Rep) 51; 3 WLR 867]. It is abundantly clear that the respondent had neither intention nor knowledge to meet the requisite criteria; Raja Aziz agreed he did not know before which body he was appearing, and it is apparent from the circumstances that he was not fully cognisant of his rights and was only conscious of having to appear before the Association at an enquiry in relation to an allegation of serious misconduct on his part.

One other point as to waiver: it was only taken in the course of argument in the Court below; it was never properly pleaded or raised in the affidavit in reply to the respondent's affidavit in support of his summons. The Supreme Court of India held in *Motilal pedampat Sugar Mills Co. Ltd. v. State Of Uttar Pradesh* [1979] AIR SC 621 that it was clearly impermissible to raise a plea of waiver without an amendment of the affidavit in reply or a supplementary affidavit raising such plea.

We should perhaps also refer to Art. 55 of the Association's Constitution which provides

that should i*nter alios* a player fail to attend any enquiry or hearing when called upon to do so, then the Council shall adjudicate upon the charge or allegation in such manner and upon such evidence as it deems expedient. If therefore the respondent had purported to stand on his rights there was the distinct and dire possibility of the enquiry proceeding in absentia and judgment by default being entered against him as it were.

In any event, as under its Constitution only the Disciplinary Committee is empowered to exercise the jurisdiction of the Council of the Association in all cases of misconduct and infringement of the Constitution, there can be no waiver, if waiver can apply at all, to confer jurisdiction in the matter on the Executive Committee. Jurisdiction does not originate in the consent or acquiescence of the parties and cannot be established, where it is absent, by such consent, acquiescence or waiver of rights [*Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1983] CLJ (Rep) 266; *Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* [1983] CLJ (Rep) 150].

And so, *cadit quaestio.* It is not accordingly necessary to consider the other matters raised in relation to the application of the rules of natural justice as our conclusion on the issue of waiver is decisive of the matter. The appeal was accordingly at the conclusion of argument dismissed with costs, and the deposit lodged in Court by way of security directed to be paid out to the respondent.

Also found at [1988] 1 CLJ 119